No. 90-970

In The

Supreme Court of the United States

October Term, 1990

LECHMERE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* FOR FOOD MARKETING INSTITUTE

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BRIEF OF AMICUS CURIAE FOR FOOD MARKETING INSTITUTE

The Food Marketing Institute ("FMI") respectfully submits this brief as amicus curiae in support of Petitioner. The written consent of the parties for submission of this brief has been obtained and

filed with the Clerk of the Court, pursuant to Rule 37.3 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The broad question before the Court is whether union representatives have a right to trespass on private property to engage in activity protected by Section 7 of the National Labor Relations Act ("Act" or "NLRA"). The National Labor Relations Board ("Board" or "NLRB") determined in the present case that union representatives could not be excluded lawfully from the parking lot and other exterior areas of Petitioner's retail store. Lechmere, Inc., 295 NLRB No. 15, 131 LRRM 1480, enf., 914 F.2d 313 (1st Cir. 1990). The Board's decision is one of a series of recent cases requiring retail store owners to open their

property to union representatives intent, in some instances, on nothing more lofty than injuring their businesses.

As an organization representing almost 19,000 retail food stores from around the country, FMI is deeply concerned by the Board's failure to recognize the important interests that food and other retail store operators have in maintaining a positive environment for consumers.[1/] Many FMI members have well-established policies prohibiting or strictly limiting non-business-related activities on their property, much like Petitioner's policy prohibiting all solicitation on its premises.

1/ FMI is a non-profit association of 1,600 food retailers and wholesalers operating approximately 19,000 retail food stores. Their combined annual sales volume of approximately $180 billion represents more than half of all grocery sales in the United States. The retail membership includes large multi-store chains, small regional chains, and independent supermarkets.

FMI members have found that consumers are more inclined to shop, and to shop often, when the retail food store and its environs are attractive and friendly places. Food retailing is a highly competitive, low-margin business depending on volume and repeat business to make the difference between success and failure. Survival in this industry depends, in great part, on a retailer's ability to offer consumers a convenient, pleasant, and friendly shopping experience. If a store fails to meet these expectations, consumers will take their business to the store across the street or down the road.

FMI members invest substantial resources to create and maintain inviting environments for consumers. Their ability to control how, and by whom, their property is used is crucial to maintenance of an appealing

shopping environment. The Board's decision in this and other recent cases involving retail establishments trammel property rights in a manner never contemplated by the Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

On behalf of its members, FMI urges the Court to reject, as it has in the past, the Board's failure to respect the constitutionally-based rights of private property owners who open their property to the public for commercial purposes alone.

SUMMARY OF ARGUMENT

By enforcing the Board's order against Petitioner, the First Circuit Court of Appeals affirmed the Board's repudiation of principles first established by the Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105

(1956). The Court established the guiding principle in Babcock & Wilcox that access to private property can be denied union representatives "if reasonable efforts by the union through other available channels of communication will enable it to reach [its audience] . . ." 351 U.S. at 112. It then rejected the Board's ruling that a factory owner could not lawfully remove union organizers from its property.

Twenty-two years later, in Sears, Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180, 205 n. 41 (1978), the Court explained for the first and only time the results it expected to flow generally from Babcock & Wilcox -- access to private property would be required only in "cases involving unique obstacles to non-trespassory methods of communication."

Although Petitioner's case is substantially similar factually to Babcock & Wilcox, the Board relied on its formulation of the issues in Jean Country, 291 NLRB No. 4 (1988), to find that Petitioner violated the Act by insisting that union organizers leave its property. The Circuit Court accepted Jean Country as a permissible interpretation of the Court's Babcock & Wilcox principles, despite the fact that application of Jean Country to private retail property has created, virtually without exception, a permanent easement for union representatives to communicate face-to-face with their target audiences.

The Board has turned Babcock & Wilcox on its head and made union access to private property the rule, rather than the exception. In the process, the Board has rejected all of the "usual methods of

imparting information" in late twentieth century America which do not entail trespassing on private property, including those specifically approved in Babcock & Wilcox, 351 U.S. at 107, 112.

The Board has also failed to accord sufficient weight to the retailer's constitutionally-based property rights. It consistently misapprehends the fact that private retail property is open to the public. The Board's consequent "taking" of the private retail property owner's right to exclude violates the Fifth Amendment because it unreasonably impairs the retailer's business use of its property without just compensation. That the "taking" has been exercised on behalf of the weakest Section 7 rights, and in all cases without temporal limitation, only emphasizes further the constitutional infirmity of the Board's

post-Jean Country decisions. The Court must restore the proper balance between property rights and Section 7 rights, and reverse the decision of the First Circuit Court of Appeals.

ARGUMENT

POINT I

THE SUPREME COURT HAS ESTABLISHED THAT PROPERTY OWNERS CAN BE REQUIRED ONLY RARELY TO ALLOW NON-EMPLOYEE UNION ACTIVITY ON THEIR PROPERTY.

The Supreme Court first considered whether union representatives could lawfully be excluded from private property in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). A union sought to distribute leaflets to workers within a private factory parking lot. Because the union's organizing activity was protected by Section 7 of the Act, the Board ruled that the factory owner

could not lawfully remove the organizers from its property. Babcock & Wilcox Co., 109 NLRB 485 (1954).

The Court rejected the Board's decision, declaring:

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

351 U.S. at 112. The Court went on to explain that the "usual methods of imparting information are available. The various instruments of publicity are at hand." 351 U.S. at 113. The Court mentioned specifically that the union could reach employees by sending literature through the mail, and by speaking with them in their homes, on the

public streets, and by telephone. 351 U.S. at 107. Under these circumstances, the Court found no basis in the Act to compel the employer to allow union representatives on its property to distribute literature and speak with employees. 351 U.S. at 112.

During the thirty-five years since its Babcock & Wilcox decision, the Court has not departed from the guiding principle that access to private property can be denied union representatives "if reasonable efforts by the union through other available channels of communication will enable it to reach [its audience] . . ." 351 U.S. at 112. Nor has the Court indicated that a union is entitled to trespass on private property when alternatives such as the mails, telephone calls, meetings, and the media are available to reach its target

audience.[2/] To the contrary, in Sears, Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180 (1978), the Court discussed for the first and only time the results it expected to flow from Babcock & Wilcox -- that union access to private property would be very much the exception and not the general rule. 436 U.S. at 205.

In Sears, the Court considered whether the NLRA preempted a state court injunction against a union's trespassory "area

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2/ In Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), the Court rejected application of First Amendment principles to the question of whether union organizers could be excluded from a retail store's parking lot. The Court remanded the case to the Board with instructions to apply the principles from Babcock & Wilcox. Four years later, in Hudgens v. NLRB, 424 U.S. 507 (1976), the Court instructed the Board to apply Babcock & Wilcox principles to economic strike-related picketing as another example of activity protected by Section 7. In neither case did the Court suggest how the accommodation between property rights and Section 7 rights should be struck, nor whether there were alternative channels of communication available to the union.

standards" picketing. It found no federal preemption of state court jurisdiction.

The Court evaluated the union's trespassory picketing under Babcock & Wilcox to determine whether it was protected by Section 7. Although it was not essential for the Court to resolve this issue definitively, and it did not purport to do so, the Court's ultimate conclusion rested firmly on its opinion that trespassory activity is only rarely protected by Section 7.[3/] The Court explained:

3/ The Circuit Court's suggestion in Lechmere that the Supreme Court's holding in Sears turned on the relatively weak Section 7 right involved is a post hoc rationalization. 914 F.2d at 319-320. Although the Supreme Court doubted that area standards activity was entitled to the same measure of protection as organizing activity, the Court assumed, for the purposes of its decision, "that picketing to enforce area standards is entitled to the same deference in the Babcock accommodation analysis as organizational solicitation. . ." 436 U.S. at 206. Only recently has the Board recognized explicitly that area standards activity does not "lie at the very core" of the Act. 436 U.S. at 206, n. 42; Fairmont Hotel, 282 NLRB 139, 143 (1986).

> [W]hile there are unquestionably examples of trespassory activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.
>
> Experience with trespassory organizational solicitation by non-employees is instructive in this regard. While Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.

436 U.S. at 205.4/

4/ The Circuit Court's suggestion to the contrary in Lechmere notwithstanding (914 F.2d at 320 n. 5), the Court was not merely reinforcing in Sears that the trespasser bore the burden of proving the lack of reasonable nontrespassory alternatives. It was very important to the Court's holding that "the assertion of state jurisdiction in a case of this kind does not create a significant risk of prohibition of protected conduct . . ." 436 U.S. at 207.

The Court's decisions in Babcock & Wilcox and Sears, taken together, establish that private property owners can be required to allow union representatives on their property only in "cases involving unique obstacles to nontrespassory methods of communication." Sears, 436 U.S. at 205, n. 41. An employer "must allow [a] union to approach his employees on his property" only "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." Babcock & Wilcox, 351 U.S. at 113. These principles are repudiated by the Board's decision in this case.

POINT II

THE BOARD'S DECISION IN THIS CASE IS ONE IN A SERIES OF RECENT BOARD DECISIONS THAT CANNOT BE RECONCILED WITH BABCOCK & WILCOX AND ITS PROGENY.

A. The Present Case Is Virtually Indistinguishable Factually From Babcock & Wilcox.

The present case arose, like Babcock & Wilcox, because an employer enforced its non-discriminatory no-solicitation policy against union organizers attempting to distribute leaflets to employees in its parking lot. The union also used mailings, telephone calls, and home visits in its efforts to enlist employee support, as did the union in Babcock & Wilcox. Lechmere, 914 F.2d at 327 (Torruella, J., dissenting). In addition, the union placed five advertisements in a local daily newspaper distributed in the area where most employees lived, and it

distributed handbills and displayed picket signs from public property adjacent to Petitioner's property. Id.

Notwithstanding the marked similarity between the facts of this case and the facts in Babcock & Wilcox, the Board ruled that Petitioner violated Section 8(a)(1) of the Act by insisting that the union organizers leave its property.[5/] The Board rejected

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5/ Although Babcock & Wilcox involved the parking lot of a manufacturing plant, and the present case involves the parking lot of a retail store, there is no significance to this distinction. In both cases, the employers undertook to control and limit non-commercial activities on their properties through non-discriminatory policies prohibiting solicitation and distribution. Babcock & Wilcox, 351 U.S. at 107; Lechmere, 914 F.2d at 316. Moreover, there was no finding by the Board in either case that the employer tolerated any non-business-related activities on its property. That Petitioner's property is open to the public for the purpose of shopping and related activities does not cause it to lose its private character. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972); cf., Central Hardware Co. v. NLRB, 407 U.S. at 547. It is also not

(continued on next page)

the entirely satisfactory "instruments of publicity at hand" in Babcock & Wilcox (351 U.S. at 113), thereby repudiating the guiding principle of Babcock & Wilcox "that the employer's right to exclude must yield only 'when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them.'" Note, Labor Law - Employees' Right to Organize - First Circuit Upholds NLRB Order Granting Nonemployee Organizers Access To Retail Store's Parking Lot, 104 HARV. L.

(continued from previous page)

5/ significant that the employees in Babcock & Wilcox lived in a relatively undeveloped area while Petitioner's employees live in a highly developed, urban-suburban area. Monogram Models Inc., 192 NLRB 705 (1971) (Board declined to apply different rules for big cities and small towns in applying Babcock.) In both cases, the unions had documented success reaching the same percentage of targetted employees. Lechmere, 914 F.2d at 327 (Torruella, J., dissenting).

REV. 1407, quoting Babcock & Wilcox, 351 U.S. at 112.

In this case, the Board not only made no effort to distinguish Babcock & Wilcox factually, it failed to even mention Babcock & Wilcox in its decision. The Board, instead, relied exclusively on its formulation and analysis of the issues described in Jean Country, 291 NLRB No. 4, 129 LRRM 1201 (1988). It is to this formulation, and its application, that we now turn.

B. Jean Country And Its Progeny Have Created, Almost Without Exception, A Permanent Easement For Unions On Private Retail Property.

The Board's Jean Country analysis purportedly combines a careful evaluation of an extensive array of factors related to the conflicting Section 7 and property rights presented in the particular case, with an

examination of the nontrespassory communication alternatives available to the union. Jean Country, 129 LRRM at 1204-1205. The Board explained that "in all cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." 129 LRRM at 1205.

In reality, the Board's formulation in Jean Country and its subsequent application to this and other cases involving retailers repudiates the guiding principles from Babcock & Wilcox. The Board has created, virtually without exception, a permanent easement for unions on private retail property which allows them face-to-face contact with their target audiences in the most convenient and least costly locations.

A review of the Board's post-Jean Country cases where the retailer possessed an enforceable property interest in its parking lot and adjacent areas will illustrate how very far the Board has strayed from the path laid down by the Court in Babcock & Wilcox and its progeny.

In Target Stores, 292 NLRB No. 93, 130 LRRM 1331 (1989), union representatives were entitled to picket and to distribute area standards handbills asking consumers to boycott a retail store because it was using a non-union maintenance contractor. Access to the entrance of the store was required notwithstanding that the retailer enforced a broad no-solicitation rule and that area standards activities are not core Section 7 activities. 130 LRRM at 1333. The retailer's property rights were weak because the "general public is invited to patronize"

the store. Id. The only nontrespassory communication alternatives considered by the Board were picketing and handbilling at the perimeter of the property. Id. They were rejected. Id.

In Mountain Country Food Store, Inc., 292 NLRB No. 100, 130 LRRM 1329 (1989), union representatives were entitled to stand immediately in front of several retail food stores and distribute handbills asking consumers to boycott Coca Cola products distributed by a bottling company it was striking. Although the retailer maintained a broad no-solicitation policy, its property rights were weak because the property was "essentially open to the public." 130 LRRM 1330. The only nontrespassory communication alternative evaluated by the Board was handbilling consumers from the perimeter of the property. 130 LRRM at 1330. This "only

possible reasonable alternative" was rejected. Id.

In Dolgin's, a Best Company, 293 NLRB No. 102, 131 LRRM 1159 (1989), union representatives were entitled to picket and to distribute area standards handbills asking consumers to boycott the retailer because it was using non-union contractors for remodeling. Access to the front entrances of several of the retailer's stores was required notwithstanding that the retailer excluded all soliciting from its parking lots, and that area standards activity was involved. 131 LRRM 1161. Property rights were weak because the property was "generally held open to the public." Id. The Board considered no alternative beyond handbilling consumers from the perimeter of the property. Id. This alternative was rejected. Id.

In Granco, Inc., 294 NLRB No. 7, 131 LRRM 1325 (1989), union representatives were entitled to picket and to distribute handbills asking consumers to boycott a retail store because it failed to remedy several alleged unfair labor practices. Access to the store's entrance was required notwithstanding that the union picketed and handbilled in an immediately adjacent public area and in areas designated by the retailer near the store. 131 LRRM at 1327. The Board considered no other alternatives.

In Sentry Markets, Inc., 296 NLRB No. 5, 132 LRRM 1001 (1989), enf. gr., 914 F.2d 113 (7th Cir. 1990), union representatives were entitled to distribute handbills asking consumers to boycott meat products distributed by a company it was striking. Access to the food store's entrance was required notwithstanding that nontrespassory

alternatives such as newspaper advertising, direct mail, and hand delivery in adjacent neighborhoods were readily available, and that there was picketing on public property adjacent to the entrance of the property. 132 LRRM at 1004. The food retailer prohibited all solicitation on its property, except by the Salvation Army during the holiday season. 132 LRRM at 1003-1004.

In Target Stores, 300 NLRB No. 136 (1990), union representatives were entitled to stand immediately in front of two of the retailer's three stores and distribute area standards handbills urging a consumer boycott because it was using non-union contractors for remodeling. Access was required notwithstanding that the retailer excluded all soliciting from its property and that area standards activity was involved. Property rights at both locations

were weak due to the "open and public nature" of the properties. The only alternative the Board considered was handbilling consumers from the perimeter of the property. It rejected this alternative.

In Wegmans Food Markets, Inc., 300 NLRB No. 114 (1990), union representatives were entitled to stand at the entrance to a retail food store and distribute handbills urging customers to boycott the non-union store in favor of stores employing the union's members. Access was required notwithstanding that the union had used nontrespassory handbilling, direct mail, telephone calls, and lawn signs to reach the food retailer's customers in other communities, and that newspaper, radio, television, and bus advertising were also readily available. 300 NLRB No. 114, slip. op. ALJ dec. at 5, 12. The food retailer's "property

rights [did] not weigh heavily" because the property "is open to the public . . ." 300 NLRB No. 114, slip. op. ALJ dec. at 10.

On the other side of the ledger of retail store cases are four cases which present circumstances so unique that they do not undercut FMI's contention that the Board has established an easement for union representatives on private retail property.

In Tecumseh Food Land, 294 NLRB No. 37, 131 LRRM 1365 (1989), the union was not entitled to position five representatives in a small, twelve-foot square area in the food store's immediate entrance because their location tended to impede access to the store. 131 LRRM at 1367. The food store had already permitted union representatives to distribute area standards handbills and to picket elsewhere on its property. 131 LRRM at 1366. This case stands only for the

proposition that a union has no Section 7 right to physically interfere with a retail store's patrons. The Board indicated it would not have allowed the food store to exclude the union altogether. It stated that a "proper balancing of the parties rights here would permit the Union to distribute its handbills in some manner and at some place on the property." 131 LRRM at 1367.

In Richway, a Division of Federated Dept. Stores, Inc., 294 NLRB No. 49, 131 LRRM 1362 (1989), union representatives were not entitled to stand in front of two newly-constructed retail stores and distribute area standards handbills protesting non-union contractors no longer on the site. 131 LRRM at 1365. The Board was persuaded by an absence of evidence that the retailer had any ongoing relationship with the

primary employer with whom the union had its dispute. 131 LRRM at 1364. This case establishes, at most, that a retailer need not tolerate union trespassing when it has no relationship with the primary employer.[6/]

In Target Stores, 300 NLRB No. 136 (1990), another exceptional case, union representatives were not entitled to distribute area standards handbills to consumers in front of a retailer's leased store. The Administrative Law Judge ordered the retailer to allow union access to two of its properties (discussed infra at 25), but he did not impose the same burden on the landlord for the retailer's third store because the General Counsel failed to negate

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6/ It might also have been significant to the Board that the union's activity, itself, may have violated the Act. 131 LRRM at 1363.

testimony that a large grassy area on the public property close to the shopping center's entrance was an appropriate site for reaching consumers. Although the retailer challenged the Judge's order requiring access to the stores it owned, there was no appeal from the Judge's ruling on the third store. 300 NLRB No. 136, slip. op. at 1 fn. 2. The Board affirmed the ruling against the retailer, but it also took pains to distance itself from the Judge's latter ruling. Id. When compared to the Board's own rulings in factually similar cases, this aspect of Target Stores is aberrant. Compare, Target Stores, 292 NLRB No. 93; Dolgin's, 293 NLRB No. 102; Wegmans Food Markets, Inc., 300 NLRB No. 114.

In Red Food Stores, Inc., 296 NLRB No. 62, 132 LRRM 1164 (1989), union representatives were not entitled to engage in area

standards picketing or handbilling in front of three retail food stores. Although at first glimpse this case might suggest that Jean Country did not establish a per se rule granting union representatives an easement on private retail property, unique facts and the Board's subsequent decision in Wegmans Food Markets combine to leave the rule intact.

In Red Food Stores, the union was purportedly protesting the food retailer's payment of low wages and its foreign ownership. The union admitted, however, that it did not know whether the retailer's wages were below area standards (they were not). 132 LRRM at 1168. Chairman Stephens concluded that the union was not engaged in area standards activity protected by Section 7. 132 LRRM at 1168. Stephens also concluded that the union's attack on the

retailer's foreign ownership was unprotected. 132 LRRM at 1168. Absent any activity protected by Section 7, Stephens concluded that the union could be excluded lawfully from the food retailer's property. 132 LRRM at 1168.

The Board majority did not share Chairman Stephens' concerns. They were persuaded, however, by the union's extensive television ad campaign and some picketing and handbilling on public property adjacent to the stores. They found these nontrespassory communication alternatives sufficient to justify denying the union access to consumers in front of the stores. 132 LRRM at 1167-1168.

Any hope raised by Red Food Stores for an objective, reasoned evaluation by the Board of a union's Section 7 rights and the nontrespassory communication alternatives

available to it were promptly dashed by its next decision involving a food retailer. In Wegmans Food Markets, Inc., 300 NLRB No. 114 (1990), the union tried to distribute two separate handbills to the retail food store's customers. 300 NLRB No. 114, slip. op. ALJ dec. at 6. The first asked patrons to boycott the store in favor of certain unionized stores. Id. The second handbill asked shoppers to complain to the retailer because its prices were allegedly higher in their community than in others. Id. The retailer contended that the union's distribution of the second handbill was not protected by Section 7, and that it weakened sufficiently the union's already weak Section 7 right to distribute the first handbill. The Board declined to consider whether distribution of the second handbill was unprotected. 300 NLRB No. 114, slip.

op. at 1 fn. 2. Following Red Food Stores and Wegmans, it appears that retailers must tolerate any merely colorable Section 7 activity on their property.

The Board majority's holding in Red Food Stores, premised on the union's actual reliance on nontrespassory communication alternatives, is also seriously undercut by Wegmans. The union in Wegmans relied extensively on nontrespassory handbilling, direct mail, telephone calls, and lawn signs to communicate its "boycott non-union" message to the food retailer's customers in several communities. 300 NLRB No. 114, slip. op. ALJ dec. at 5. The union declined to pursue any of these options in the community served by the store in question. Id. The Board rejected the food retailer's contention that the union's continued reliance on nontrespassory communication

alternatives permitted, as did the union's media campaign in Red Food Stores, denial of access to the union. 300 NLRB No. 114, slip. op. ALJ dec. at 12. Following Wegmans, it appears that the Board will no longer consider a union's sustained reliance on nontrespassory communication alternatives when evaluating whether union representatives must be given access to private retail property. The Board's hostility to nontrespassory communication alternatives could not be more manifest.

C. The Board Has Repudiated Principles Established In Babcock & Wilcox.

(1) The Board has rejected as nontrespassory alternatives the "usual methods of imparting information."

The Board has consistently ignored the guiding Babcock & Wilcox principle that union access to private property may be

denied where the "usual methods of imparting information are available." 351 U.S. at 113. The Board has rejected virtually all of the "usual methods of imparting information" in late twentieth century America. In the present case, the Board rejected Petitioner's contention that the union could reach employees through the mails, telephone calls, and by personal contact at home. 131 LRRM at 1482. These were, however, the same alternatives sufficient in Babcock & Wilcox to avoid destruction of the employees' Section 7 right to self-organization. 351 U.S. at 111. In other cases, most notably Sentry Markets and Wegmans Food Markets, the Board has rejected all remaining "usual methods of imparting information."

(2) The Board has failed to give sufficient weight to retailers' constitutionally-based property rights. It misapprehends the fact that retail property is open to the public.

The Board has failed to accord any significance to the retailer's right as a property owner or leaseholder to exercise, in furtherance of its legitimate business interests, one of the most treasured strands in its bundle of property rights - the right to exclude. The Board consistently misapprehends the fact that retail store property is open to the public.

The retailer's invitation to the public is limited to activities which it believes are beneficial to its commercial purposes. The "public" is neither invited nor permitted to engage in an infinite array of activities on the retailer's property.

Creation and maintenance of a friendly, inviting environment is important to many retailers, particularly food retailers. It is for this reason that many retailers expend considerable resources on the appearance of their property and exercise strict control over how, and by whom, their property is used. Crowds of union representatives and others pursuing their own causes in the entrance areas of food and other retail stores by their mere presence and demeanor discourage shoppers and injure the retailer.7/ Non-discriminatory no-solicitation policies are maintained to protect the retailer from this injury. For these reasons, the retail property owner's right to exclude is at least as compelling

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7/ This is the union representatives' intention, typically, separate and apart from the quality or persuasiveness of their message.

as that of the private factory owner whose business is not harmed by union representatives on its property. The Board's rulings, however, accord no greater respect to the rights of the retail store located on private property than the retailer fronting a city sidewalk.

The Board's rulings since Jean Country notwithstanding, modern private retail shopping centers and stores are not the functional equivalents of our Nation's city streets. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Court rejected the Board's previous efforts to resurrect Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) in Central Hardware Co. v. NLRB, because "it would . . . constitute an unwarranted infringement of long settled rights of private property protected by the

Fifth and Fourteenth Amendments." 407 U.S. at 547. The Court must do so again.

The Board's ruling in this and other post-Jean Country cases create a broad exception to the general rule that a private property owner may control by whom, and for what purposes, its property is used. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). The Court has recognized that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Id. The Court has also recognized that the property owner's right to exclude falls within the category of interests that the government cannot take without compensation. Kaiser Aetna v. U.S., 444 U.S. 164, 179-80 (1979). The Board has, thus, not only misapprehended the significance of this particular right to retail

property owners, it has violated the due process clause of the Fifth Amendment by establishing easements for union representatives on private retail property.

Whether government restriction of the right to exclude solicitors from private property constitutes a "taking" for which just compensation is due was addressed by the Court in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). The state court had construed its constitution to require a private shopping center to permit high school students to distribute literature and solicit support for their petitions. In analyzing whether there had been a Fifth Amendment "taking," the Court observed that one of the essential sticks in the bundle of private property rights is the right to exclude others. 477 U.S. at 82. It then

explained that there literally had been a "taking" of that right because of the state court's ruling that citizens were entitled to exercise free expression rights on shopping center property. Id.

The Court then stated that not every destruction or injury to property by governmental action is a "taking" in the Constitutional sense. Id. To determine whether a government regulation amounts to a "taking," there must be an examination "into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." 477 U.S. at 83. Examining these factors in the case before it, the Court concluded there was not an unconstitutional infringement of the shopping center owners' property rights because "[t]here is

nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." Id.

The facts in Pruneyard Shopping Center stand in stark contrast to the present case and others like it where the Board has ordered the retailer to allow union representatives to picket and distribute handbills directly in front of its store. The Board's "taking" unreasonably impairs the retailer's business use of its property because it damages the appealing environment that the retailer has invested substantial sums to create.8/

8/ The Board's order requiring a food retailer to allow "boycott non-union" handbilling at its front door is perhaps the clearest example of an unconstitutional "taking" by the Board. See, Wegmans Food Markets, 300 NLRB No. 114. The union's express purpose is to damage the retailer's business by discouraging consumers from shopping there. A more immediate impairment of the retailer's reasonable investment-backed expectations cannot be imagined.

(3) The Board has required retailers to tolerate trespassing union representatives exercising the weakest Section 7 rights.

The Board's Jean Country analysis in the retail store context has consistently disregarded the Court's admonition that "the locus . . . of accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the . . . §7 rights . . ." (Hudgens, 424 U.S. at 522) by according the very weakest Section 7 rights treatment equal to those lying "at the very core" of the Act. Sears, 436 U.S. at 206 n. 2. The Board has required private property rights to yield to all Section 7 activities, irrespective of whether they address concerns which lie at the core of the Act. Retailers have had their properties burdened no less extensively by area

standards and "boycott non-union" activities than by core Section 7 activities like union organizing and economic strike activities. Perhaps the most egregious example can be found in Wegmans Food Markets, 300 NLRB No. 114, where the Board assumed that only half of the union's consumer boycott activity was protected by Section 7. It nonetheless required the food retailer's property rights to yield to activity of only tangential concern to the Act.[9/]

9/ The Court explained in Sears why it imagined that area standards activity aimed at provoking a consumer boycott was not "at the very core of the . . . NLRA . . ." 436 U.S. at 206 n. 42. Union activity to induce a consumer boycott of a retailer because its employees have not selected the union to represent them is still farther out on the fringes of Section 7. First, this type of activity has only recently been recognized as a Section 7 right. D'Alessandro's, Inc., 292 NLRB No. 27, 130 LRRM 1089 (1988); L&L Shop Rite, Inc., 285 NLRB 1036, 126 LRRM 1151 (1987); Smitty's Supermarket, Inc., 284 NLRB 1188, 125

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(4) The Board has placed no temporal limits on easements granted union representatives.

In Jean Country and its progeny, there are no temporal limitations on the easements granted union representatives by the Board. Petitioner may, for example, be compelled to endure union organizers on its property until they tire of the activity, if ever. In some instances, it can be expected that

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9/ LRRM 1268 (1987). Second, unlike area standards activity, the union engaged in a "boycott non-union" campaign has no dispute with the target employer. Compare, Giant Food Markets, Inc., 241 NLRB 727 (1979). The union's dispute is really with the retailer's employees who have exercised their Section 7 right to speak for themselves. Moreover, to the extent the union's consumer boycott is successful, employees of the retailer risk decreased pay and benefits, or loss of employment, because they have chosen to remain non-union. Thus, not only are the Section 7 protections in this instance extremely attenuated, the union's actions trammel both the retailer's property rights and the Section 7 rights of its employees.

union representatives will remain for years at a time. In Wegmans Food Markets, for example, the retailer has been the target of steady "boycott non-union" handbilling and related activities for three years with no signs of waning.

It was contemplated by the Court that the "yielding of property rights" required by Babcock & Wilcox would be both "temporary and minimal." Central Hardware v. NLRB, 407 U.S. at 545; Loretto, 458 U.S. at 435 n.12. There is nothing in the Board's Jean Country formulation or in any of its resultant decisions which recognizes this principle.

CONCLUSION

For the foregoing reasons, the Court should restore the balance between property rights and Section 7 rights carefully struck

in Babcock & Wilcox and reverse the decision of the First Circuit Court of Appeals enforcing the Board's order.

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